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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1037

GRAZIANO J. MANCUSO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Graziano J. Mancuso, Petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit (en banc), entered in this case on December 8, 1967.

OPINIONS BELOW

The oral opinion of the District Court (App. C, *infra*, pp. 43-54) is unreported. The original opinion of a three-judge panel of the Court of Appeals (App. A, *infra*, pp. 25-36) is reported at 378 F. 2d 612. On rehearing en banc, the Court of Appeals rendered an addendum opinion (App. A, *infra*, pp. 37-38) which has not yet been reported.

JURISDICTION

The Court below entered judgment on December 8, 1967, after rehearing en banc (App. B, *infra*, p 41). On Decem-

ber 18, 1967, the Court below stayed its mandate pending timely application to this Court for a writ of certiorari (App. B, *infra*, p. 42). On January 3, 1968, Mr. Justice Brennan extended the time for filing the transcript of the record in this case to and including February 6, 1968. The jurisdiction of this Court is invoked under 28 U.S. Code §1254(1).

QUESTIONS PRESENTED

1. Is a taxpayer interviewed by a Special Agent of the IRS, who is gathering evidence for intended use in a criminal tax prosecution, entitled by the Sixth Amendment to warning that he is the subject of a criminal investigation and of his right to counsel before evidence obtained from him can be used to convict him of charges resulting from such investigation?

2. Is it contrary to the Sixth Amendment and to the fair administration of justice for a federal prosecutor, who has wrongfully obtained and examined the private files and work product of defense counsel, to prosecute the case to conviction forearmed with advance personal knowledge of the entire defense case?

CONSTITUTIONAL PROVISION, STATUTES, RULES OF COURT, AND REGULATIONS INVOLVED

All constitutional provisions, statutes, rules of court, and regulations involved are set forth in App. D, *infra*, pp. 55-57.

STATEMENT

Petitioner was convicted in the District Court for the District of Maryland on each of five counts of an indictment charging willful evasion of income tax for the years 1956-1960. (26 U.S. Code §7201.)

1. *The right-to-warning question.* On December 15, 1960, Revenue Agent Levitas determined that a potential tax fraud case existed against Petitioner, a partner of a family business in Baltimore. He referred the file to Special Agent Gordon, whose "primary function was the investigation of a taxpayer's affairs in order to determine whether or not criminal prosecution should be recommended."[1] On December 19, Gordon concluded that criminal fraud was involved. On May 31, 1961, after six months' investigation, Gordon by letter directed Petitioner to appear "with whatever financial records you possess". On June 9, without having consulted a lawyer and without one present, Petitioner met with Gordon and Levitas in an IRS conference room for what he assumed would be a routine audit. Also present was the accountant who had prepared his returns. In this, his very first encounter with IRS agents, Petitioner was not told that a criminal investigation was in progress; that he was suspected of fraud; that Gordon had already decided to work up a net worth prosecution against him. Nor was he advised of his right to counsel. Gordon obtained admissions as to starting point net worth by posing a long series of questions, many of which Petitioner did not understand or know how to answer. Gordon demanded and received all of Petitioner's personal and partnership records, which he retained for nearly a year.

Petitioner heard nothing further for six months. Unknown to him, Gordon intensified his investigation, secured affidavits, and subpoenaed bank records. On December 14, he met again with Petitioner and interrogated him at length without mentioning the right to counsel or the real purpose of his inquiry. On February 2, 1962, Gordon notified Petitioner *for the first time* that he was being recommended

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[1] This fact was conceded on rehearing en banc. Appellee's Supplemental Brief on Rehearing en Banc, p. 19. Gordon's own testimony was to the same effect.

for prosecution and was entitled to legal representation. Only then (and in immediate response to this notice) did Petitioner retain counsel, who filed a power of attorney, secured return of his books and records, and brought the interviews to a halt.

Petitioner was indicted in 1963, and moved to suppress all oral statements and documents given to Gordon, invoking the Sixth Amendment. The foregoing facts were presented at a pre-trial hearing before District Judge Northrop, who denied the motion on the ground that Petitioner had not requested a lawyer and that *Escobedo v. Illinois*, 378 U.S. 478, applied "only where a request has been made and that request has been denied" (App. C, *infra*, p. 46).

At trial (January 24-February 11, 1966), Gordon was permitted to testify as to purported oral admissions and documents obtained from Petitioner during the two 1961 interviews. Petitioner had to take the witness stand to dispute the truth and accuracy of Gordon's versions. The Court's charge included instructions that the jury could consider his extrajudicial utterances and weigh any "false exculpatory statements" as bearing "on the question of intent to evade income taxes". After conviction, motion was filed in the alternative for acquittal or new trial, which was denied without opinion on July 29, 1966. Petitioner duly appealed.

In an opinion of May 19, 1967, a three-judge panel of the Court of Appeals held that *Escobedo* "principles may apply in federal tax cases" but not "to a tax audit, i.e., an investigation by revenue agents of a taxpayer's tax returns and records for the purpose of determining whether or not additional taxes are due and whether or not a crime has in fact been committed." (App. A, *infra*, pp. 35-36). The opinion further recited that, as to the two 1961 interviews,

"the defendant *was accompanied by an attorney* and his accountant" and "attended the meetings under no compulsion save his own *or counsel's judgment* that it was in his best interest to do so." Then it concluded:

> "If it be assumed that defendant *and his lawyer* were unaware of his legal right to resist the investigation, the result is the same. That defendant subjectively may not have known of his rights does not vitiate his voluntarly disclosures *made with advice of counsel.*" (App. A, *infra*, pp. 35, 36). (all italics added).

In a timely Petition for Rehearing en Banc, Petitioner invited the Court's attention to the undisputed fact that at *neither* interview was he represented or accompanied by counsel, acting with advice of counsel, or afforded legal assistance of any description. He also excepted to characterization of the criminal investigation as a mere "tax audit". The Court granted rehearing en banc (App. B, *infra*, p. 40). The supplemental briefs on both sides pointed up the clearly erroneous factual premises on which the opinion rested, but the Court en banc adopted the original opinion and affirmed without mention of this issue (App. A, *infra*, p. 38).

2. *The invasion of files question.* On September 7, 1965, two years after indictment and three weeks before the scheduled trial, an Assistant U.S. Attorney (Ronald T. Osborn) phoned Counsel and sought in vain the production of certain papers to wit: the defense net worth statements and supporting schedules prepared for Counsel's use at trial by Milton Duke, an accountant retained to assist the defense. Duke attended many attorney-client conferences and had access to the entire defense file, including confidential letters, legal memoranda, trial notes, Petitioner's private papers, and the net worth statement. Up to that time Duke's fidelity to the defense was unquestioned.

Despite knowledge of Duke's role, Osborn immediately got from Duke what he had failed to obtain from Counsel. That same morning (September 7) Osborn talked to Duke and directed him to produce the defense file. He did not notify Counsel or the Court. Osborn wanted the defense net worth schedules to supplement the Government's case and to gain insight into defense planning and strategy. Duke returned in an hour or so with the file, as well as photocopies prepared for Osborn's use. Gordon and Levitas examined the entire file and made notes (later destroyed) while Osborn subjected Duke to a lengthy interview covering his work for the defense. Osborn then personally inspected the file and had more copies made for his own use. All schedules prepared for Counsel were copied, annotated, and compared. From his review of defense material, Osborn was able to uncover Counsel's strategy, determine how Counsel proposed to meet the prosecution and exploit its weaknesses, and check the defense net worth statement against his own for discrepancies. Gordon interviewed two new witnesses whose names appeared on Counsel's papers. The Government net worth statement (used at trial) was revised a few days later.

When Counsel learned of the episode, he immediately protested in person and by letter. Ignoring these protests, Osborn called in Duke for two additional sessions and explored his dealings with Petitioner. Counsel was not notified and the secrecy of the later meetings was not broken until a pre-trial hearing before Judge Northrop on September 30. On the foregoing facts, based exclusively on the testimony of Osborn and Gordon, the Court found that Counsel's work product had been wrongfully appropriated and ordered suppression of pages copied by the Government, ordered Osborn to produce his own net worth statement, instructed him to have no further contact with Duke, and permitted Counsel time to retain another ac-

countant. However, the Court denied a motion to dismiss, finding "no reasonable likelihood of actual prejudice if the trial is allowed to go forth" (App. C, *infra*, pp. 47-48).

At trial Osborn prosecuted and called Gordon and Levitas as his main witnesses. Duke also testified against Petitioner (whose defense he had helped prepare). Government net worth statements were admitted over strenuous objection. On cross-examination of the new defense accountant (Paul Wist), the prosecution brought out that Wist had nothing to do with preparing the defense net worth statement, belittled his efforts to prepare for trial, commented upon his late arrival in the case, and flatly accused him of making false and unwarranted assumptions. After conviction Petitioner moved in the alternative for acquittal or new trial, setting forth grounds of actual prejudice. The motion was denied without opinion on July 29, 1966.

On appeal (App. A, *infra*, pp. 34-35), and again on rehearing en banc (App. A, *infra*, p. 38), the Court of Appeals held on the strength of *United States v. Blue*, 384 U.S. 251, and *Hoffa v. United States*, 385 U.S. 293, that the District Court's remedial action cured any "substantial prejudice" to Petitioner's rights under the Fourth, Fifth, and Sixth Amendments. The opinion en banc concluded as follows:

> "In argument, the government expressly disclaimed wrongful intent in what it did, and candidly admitted an extreme, even stupid, error of judgment. The government's deficiencies in the proper conduct of this prosecution were not erased by notice to counsel of what was done. Nevertheless, we are persuaded that in this case wrongful intent was absent. Except for such absence and the lack of substantial prejudice we would dismiss the prosecution and discharge the defendant under our supervisory power over the district courts of this circuit." (App. A, *infra*, p. 38).

It was Osborn (retained as a Special Assistant U.S. Attorney) who argued the case on rehearing and "persuaded" the Court that "wrongful intent was absent".

REASONS FOR GRANTING THE WRIT

I.

The-Right-To-Warning Question

1. *The decision below is tantamount to refusal to hear and determine the case on the merits.* The Court below correctly assumed that *Escobedo v. Illinois,* 378 U.S. 478, "may apply in federal tax cases" but denied Petitioner impartial review of this question because of a patently erroneous conception of undisputed facts. For reasons unknown, the Court surmised that Petitioner "was accompanied by an attorney" and acting on "advice of counsel" during the two 1961 IRS interviews. This is not even arguably true and is flatly contradicted by the record. Obviously, if he actually had counsel in 1961, no question would ever have arisen in the first place or been pressed in the court below (much less in this Court). We submit that the Court below created a straw man — a phantom lawyer — whom it criticizes for neglecting his client's rights. Despite Petitioner's briefs on rehearing, it has refused to give the straw man a decent burial and to adjudicate on the merits. Under the circumstances, it would be appropriate for this Court to summarily vacate the judgment below and remand the case for reconsideration in the light of the actual record.

2. *The deceptive practice sanctioned below is offensive to the fair administration of justice in federal courts.* In this era of expanding constitutional protection, the taxpayer still enters the field of battle with stone ax and wooden spear. Worse, he is blindfolded by Special Agents

and exposed to every weapon in the IRS arsenal before he even has a chance to find his ax and spear. If the taxpayer is ever to achieve equality of protection when he is caught up in the criminal process, he must be warned where he stands and protected from the hoax that his prosecution-minded interrogators are merely conducting a civil audit. The issues here presented are of paramount importance to the taxpaying public and can only be resolved by this Court, since the federal judiciary seems unable even to identify the problem, or come to grips with it.

The decision below is a representative holding that the Bill of Rights does not apply "to a tax audit, i.e., an investigation by revenue agents of a taxpayer's tax returns and records for the purpose of determining whether or not additional taxes are due and whether or not a crime has in fact been committed" (App. A, *infra*, p. 36). Yet nothing in the record or in the District Court's findings remotely suggests that Special Agent Gordon was a "revenue agent" conducting a "tax audit" for the pristine purpose of finding tax deficiencies. (One might as easily say that an FBI agent is checking irregularities in the Federal Reserve system when he interrogates a suspected bank robber.)

> "The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the Revenue Agent. He is exactly the same as any other Treasury Agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A Special Agent is a criminal law enforcement officer, just as any state or municipal detective or policeman." Burnes, *Searches and Seizures*, N.Y.U. 20TH INST. ON FED. TAX. 1081, 1087 (1962).

A Special Agent has sweeping powers of arrest, search, and seizure in enforcing income tax laws. See 26 U.S. Code Sec. 7608(b). Far more significant, departmental regulations (App. D, *infra*, p. 57) not only assign him *exclusively* to criminal investigations, but vest in him unreviewable discretion in recommending prosecution and make him a virtual adjunct to the U. S. Attorney.

Only after a Revenue Agent performs an audit and detects fraud does a Special Agent enter the case.

> "It is at this point, when the case is turned over to the Intelligence Division, that the investigation admittedly has as its ultimate objective the conviction of the taxpayer for criminal tax evasion. He is now a suspect who, although he is unaware of it, is being asked to furnish the investigative agents with information which he has a constitutional right to refuse to furnish and with respect to which he is entitled to have the advice of counsel. He is being asked to convict himself without knowing it." *United States v. Turzynski*, 268 F. Supp. 847, 854 (N.D. Ill. 1967).

Being concerned only with known fraud cases, the Special Agent is not seeking to determine whether fraud exists but whether it warrants prosecution. His interviews are to acquire proof of willfulness without disclosing his true purpose.

As matters now stand, a taxpayer is possibly the only criminal suspect kept unaware of imminent prosecution until he has furnished the agent with all evidence necessary to convict. The decision to prosecute hinges upon what he says or what documents he surrenders at the first interview. This is a critical stage when valuable constitutional and legal rights "may be irretrievably lost, if not then and there asserted," *Hamilton v. Alabama*, 368 U.S. 52, 54. Without legal advice a taxpayer cannot assert

his rights, even if abstractly aware of them, because every effort is made to conceal from him the central fact that he is involved in the advanced stages of a criminal proceeding. The Special Agent secretly builds his case for prosecution while nurturing the taxpayer's belief that the matter is still a routine audit which can be resolved by cooperation and compromise. Kept ignorant of his peril, and under an apparent duty to explain everything, it does not occur to the taxpayer that "he requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama,* 287 U.S. 45, 69. In such a setting, devoid of safeguards, he is relieved of his papers and coaxed into responses made on hasty reflection and with incomplete grasp of the facts — responses later construed (or misconstrued) as admissions and falsehoods. Only after the Special Agent extracts evidence he deems sufficient to convict is the taxpayer notified that the investigation is now complete and advised of his right to counsel.

The "audit hoax" has been denounced as a calculated trap for the unwary, its main victims being average citizens who (like Petitioner) are experiencing their first and probably last contact with the criminal process. Lipton, *Constitutional Rights in Criminal Tax Investigations,* 53 A.B.A.J. 517 (1967); Duke, *Prosecution for Attempts to Evade Tax: A Discordant View of a Procedural Hybrid,* 76 YALE L.J. 1 (1966); Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation,* 44 TAXES 660 (1966); Krohnke, *The Constitutional Right to Counsel in Tax Investigations,* 33 U. CHI. L. REV. 134 (1965). With but a few recent exceptions, *United States v. Turzynski, supra; United States v. Kleckner,* 273 F. Supp. 251 (S.D. Ohio), app. dis. 382 F. 2d 1022 (6th Cir. 1967); *United States v. Gower,* 271 F. Supp. 655 (M.D. Pa. 1967), the federal courts seem impervious to the cold reality that a "tax audit"

is transformed into a criminal proceeding at the precise moment that a Special Agent enters the case. A three-judge court recently went so far as to attach controlling significance to the following:

> "* * *, the special agent conducting the investigation, testified on discovery that the purpose of the investigation was to 'determine the accuracy of the income tax returns of the taxpayers.'" *United States v. First National Bank of Pikeville*, 274 F. Supp. 283, 284 (E.D. Ky. 1967).

And in *Smith v. United States*, 250 F. Supp. 803, 806 (D.N.J. 1966), a Special Agent's activities were thus described:

> "The proceeding complained of was a fact-finding, non-adjudicative investigation by an administrative agency. * * * There was no criminal prosecution here, no accused, not even a hearing, only an investigatory, fact-finding proceeding."

It is submitted that since the federal courts suffer from the widespread delusion that an interview with a Special Agent is a rather innocuous matter, it is grossly unfair for such courts to penalize and impute waivers to an unsophisticated taxpayer who is duped by the "audit hoax". Our federal system of criminal justice does not thrive on intrigue and tactics designed to induce ignorant surrender of fundamental rights. Such tactics are an affront to human dignity and, because the taxpayer is acting without grasp of the material facts, pose an inherent threat to the reliability of the guilt-finding process. That federal prosecutions and convictions should depend on evidence so acquired is ample reason why this Court, in its supervisory capacity, should review the ignoble origins. *McNabb v. United States*, 318 U.S. 332; *Elkins v. United States*, 364 U.S. 206. To give the taxpayer knowledge of the truth is to give him no more than the very thing our legal system is striving for. As this Court had occasion to say in *Escobedo v. Illinois*, 378 U.S. 478, 490:

> "We have learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizen's abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

3. *The decision below involves important constitutional questions which have not been, but should be, settled by this Court.* The decision below holds, in effect, that a taxpayer is entitled to no constitutional protection in his dealings with Special Agents if he fails to assert his rights through ignorance. Other circuits have achieved the same result by various lines of reasoning. Although the Sixth Circuit recently articulated serious misgivings on the subject, it declined to act until "told by superior authority that a citizen's constitutional rights are imperiled by such procedure * * *." *United States v. Maius*, 378 F. 2d 716, 719 (6th Cir. 1967), cert. denied 88 S. Ct. 216 (10/16/67) (No. 372, this Term). With one exception, discussed *infra*, this Court has denied certiorari in every such case to come before it. To date, however, three courts have upheld the taxpayer's position. *United States v. Gower*, 271 F. Supp. 655 (M.D. Pa. 1967); *United States v. Turzynski*, 268 F. Supp. 847 (N.D. Ill. 1967); *United States v. Schoenburg*, 19 AFTR 2d 347 (D. Ariz. 1966). Such decisions derive overwhelming support in recent articles (listed, *supra*, p. 11), all of which condemn the superficial brand of reasoning used below with regard to the Sixth Amendment. The recurring nature of the problem, and the emerging conflict in judicial opinion, suggest that this Court should undertake an authoritative review of the questions raised in this

Petition. See, e.g., *Thomas v. United States*, 386 U.S. 975 (Douglas, J., dissenting).

Petitioner invokes protection of the Sixth Amendment in contending that the Intelligence Division is an accusatory body and its investigations are an integral part of a "criminal prosecution" in which the accused taxpayer is entitled "to have the Assistance of Counsel for his defence." The Special Agent controls the prosecution from the moment he enters the case until final verdict and is an aide to the District Attorney. There is no valid reason why the same right to counsel which prevails inside and outside the courtroom after indictment. *Johnson v. Zerbst*, 304 U.S. 458; *Massiah v. United States*, 377 U.S. 201, at critical stages beforehand, *White v. Maryland*, 373 U.S. 59, and in the stationhouse after arrest, *Escobedo v. Illinois*, 378 U.S. 478, should not apply in the IRS conference room where one is "made the deluded instrument of his own conviction," *Watts v. Indiana*, 338 U.S. 49, 54, by a process so inherently deceitful that "he [does] not even know that he was under interrogation by a Government [law-enforcement] agent." *Massiah v. United States, supra*, 206. Although the element of formal custody may be lacking, surely that is not the only point at which "our adversary system begins to operate." Cf., *Escobedo v. United States, supra*, 492; *In re Groban*, 352 U.S. 330, 349-51 (Black, J., dissenting). The Court recognizes that a taxpayer may resist a Special Agent's formal demand for production of testimony and documents in "an adversary proceeding" on the ground "that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution * * *." *Reisman v. Caplin*, 375 U.S. 440, 445, 449. The adversary character is not altered by an informal demand which disguises the same improper purpose. When the prosecutorial

machinery of the Intelligence Division is directed against a taxpayer to elicit statements which will convict him, his need to be apprised of the purpose of the inquiry is as real and urgent as that of a suspect under custodial interrogation. *United States v. Turzynski, supra,* 854.

Yet the decision below holds "that a taxpayer's ignorance of the nature of an investigation by the IRS and of his legal right to resist 'is insufficient ground for suppression of evidence voluntarily given'" (App. A, *infra,* p. 36). It is specious to impute voluntariness to one who is guided by ignorance of his own situation, lacks legal advice, and is unaware of his right to resist. Voluntariness is necessarily grounded in knowledge. A taxpayer's disclosures to a Special Agent are "demanded under color of office" and "granted in submission to authority, rather than an understanding and intentional waiver of a constitutional right." *Johnson v. United States,* 333 U.S. 10, 13. The requirement of an *intelligent* as well as voluntary waiver is nullified when the Special Agent conceals his basic purpose, cf., *Gouled v. United States,* 255 U.S. 298; *United States v. Blalock,* 255 F. Supp. 268 (E.D. Pa. 1966), and — as a practical matter — leaves the taxpayer without "factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402. This is absolutely repugnant to the Sixth Amendment.

> "The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's failure to claim his rights removes the protection of the Constitution." *Johnson v. Zerbst,* 304 U.S. 458, 465.

4. *The issues presented in this Petition are the same or similar to those now pending before this Court in Mathis v. United States,* 376 F. 2d 595 (5th Cir. 1967), cert. granted,

88 S. Ct. 224 (No. 726, this Term). Here, as in *Mathis*, the basic issue is whether and to what extent the taxpayer is entitled to notice when the investigation shifts from a civil audit for possible deficiencies to a criminal investigation, when his assistance is not being sought to ascertain his just debt but to enable the Government to convict him of crime. Actually, the instant Petition would seem to provide a more substantial basis for granting review, since the Petitioner in *Mathis* was confronted only by Revenue Agents in the civil stage prior to transfer of the case to the Intelligence Division. Nor does *Mathis* involve a taxpayer ignorant of a pending criminal investigation; when a Special Agent did enter the case and sought an interview, he affirmatively advised the taxpayer and was refused any cooperation. It is true that the Petitioner in *Mathis* was incarcerated in a state penitentiary on unrelated state charges when the Revenue Agents talked to him. But it would be a tragic commentary on the paucity of a taxpayer's constitutional rights if he must be in jail before they accrue!

II.

The Invasion of Files Question

The radical departure from the adversary system, sanctioned below, calls for exercise of this Court's power of supervision. This case is perhaps without parallel in the annals of federal criminal justice. It is certainly without precedent. The prosecuting attorney has personally invaded the defense file, copied and examined Counsel's work product prepared for trial use, secured conviction with advance knowledge of the defense case, and then disclaimed on appeal any "wrongful intent" or prejudice to Petitioner. We submit that the decision below leaves a "chilling impact" on "a vital center in the administration of criminal justice, the lawyer's work in investigating and

preparing the defense of a criminal charge." *In re Terkeltoub*, 256 F. Supp. 683, 684 (S.D. N.Y. 1966). If "the Constitution recognizes an adversary system as the proper method of determining guilt," *Singer v. United States*, 380 U.S. 24, 26, this Court should keep that system in true balance by appropriate exercise of its power of supervision.

First, the decision below undermines the work-product policy of *Hickman v. Taylor*, 329 U.S. 495. Both courts below identified the material scrutinized by Osborn and the IRS agents as Counsel's work product, although part of it plainly fell within the attorney-client privilege.[2] In any event, we deal here with unjustified access to the internal memoranda of Counsel's theories, plans, and mental impressions, which

> "* * * falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted intrusions into the files and the mental impressions of an attorney." *Id*, 510.

Surely "the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure", *id*, 511, as to govern federal criminal prosecutions where the accused has no obligation to reveal any portion of his case, much less Counsel's work product. Even liberalized Rule 16(c), F.R.Cr.P., does not tolerate

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[2] As to the defense net worth statement, two circuits hold: "This statement was prepared at the attorney's request, in the course of an attorney-client relationship, for the purpose of advising and defending his clients. The accountant's role was to facilitate an accurate and complete consultation between the client and the attorney about the former's financial picture. The lower court was correct in determining that these documents constituted confidential communications within the attorney-client privilege." *United States v. Judson*, 322 F. 2d 460, 462 (9th Cir. 1963). See also, *United States v. Kovel*, 296 F. 2d 918, 923 (2d Cir. 1961).

Government access to "internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case * * *." If a federal prosecutor openly sought disclosure of work product, the court would deny it to prevent irreparable harm:

> "The ultimate interest to be protected is the privacy and confidentiality of the lawyer's work in preparing the case. It is the violation of that interest that is held offensive to the Constitution in the cases of eavesdropping and spying. The protection would be a thin illusion if the Government could have for the asking what it has, in rare lapses, sought by less genteel means." *In re Terkeltoub, supra,* 685.

Second, the absence of protection below poses a substantial question under the Sixth Amendment as to Petitioner's right to a fair trial with effective representation. According to the District Court's unimpeached findings (App. C, *infra,* pp. 44, 46-47), the Government in one of its "rare lapses" acquired "wrongfully" and by stealth that which it could not have obtained by resort to accepted judicial procedures. Here, as in *Caldwell v. United States,* 205 F. 2d 879 (D.C. Cir. 1953), cert. denied, 349 U.S. 930, Petitioner was stripped of his right to effective assistance of counsel when, without restraint or prior notice, the prosecutor and his IRS colleagues methodically examined the entire file, including Counsel's work product. It was Osborn himself who admittedly decided what documents were to be copied. While this Court has never passed directly on the constitutional question, it strongly implied in *Hickman v. Taylor, supra,* 511, that such an outrage can only have disastrous impact on the adversary system in federal courts:

> "An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of

> legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."

To remove from a lawyer the only tools which he can offer his client, especially in a complex tax prosecution in which Counsel must be resourceful to circumvent "those pitfalls inherent in the net worth method," *Holland v. United States,* 348 U.S. 121, 125, is to reduce any subsequent trial to the level of a farce. Attention is invited to the prophetic opinion of Judge Frederick van Pelt Bryan in *United States v. Simon,* 262 F. Supp. 64, 74-75 (S.D. N.Y. 1966), reversed on other grounds, 373 F. 2d 649 (2d Cir. 1967), cert. granted, *sub. nom. Simon v. Wharton,* 386 U.S. 1030, vacated as moot, 36 U.S.L.W. 3252 (12/18/67) (No. 72, this Term):

> "It would be wholly unrealistic to suppose that the prosecution in a criminal proceeding would not gain a very substantial advantage over the defendants if the nature of their defense and the evidence on which the defense was based were disclosed to the Government in advance of — and indeed here long in advance of — trial. Every experienced trial lawyer knows well the advantages the prosecution would be likely to gain under such circumstances.
>
> "With such material at its disposal a zealous prosecutor would be able to tailor his case to overcome anticipated defenses and avoid any possibility of surprise. If the defendants took the stand in their own defense, as [Petitioner did] in this case, there will already have been * * * a very material advantage to the prosecution in conducting its own cross-examination. The advantages gained to the prosecution might well be sufficient to tip the scales in favor of conviction particularly in a close case. Under the circumstances, the prosecution should not be permitted 'to obtain information * * * in a manner in which it [was]

> not entitled under the criminal rules.' This would circumvent the limitations provided by the criminal rules to ensure the fair administration of criminal justice from the standpoint both of the defense and prosecution." (Citations omitted).

Third, reliance below upon this Court's decisions in *United States v. Blue*, 384 U.S. 251, and *Hoffa v. United States*, 385 U.S. 293, is entirely misplaced. *Blue* held only that illegal acquisition of *evidence* does not bar the prosecution, not that the prosecution may delve into confidential files and try cases "on wits borrowed from the adversary." *Hickman v. Taylor, supra*, 516 (Jackson, J., concurring). Nor does *Hoffa* confer any such strategic advantage: (1) The claimed intrusion during Hoffa's Test Fleet trial did not bar later prosecution "on other and different charges." (2) The "clinching basic fact" in *Hoffa* was that the disclosures bore no relation to the charges on which he was ultimately tried and convicted. (3) There was no "exploitation" of a Sixth Amendment violation since the Test Fleet trial did not result in conviction. (4) Had such conviction materialized, it "would presumptively have been set aside as constitutionally defective." (5) Partin was an outsider to the attorney-client relationship and had no role in preparing the defense. (6) In contrast to *Massiah v. United States*, 377 U.S. 201, Hoffa was not under indictment on the charges of which he was ultimately convicted and this Court "put to one side the extraordinary problems that would have arisen if [he] had been arrested and charged during the progress of the Test Fleet trial." (7) This Court acknowledged its ability "to imagine a case in which the prosecution might so pervasively insinuate itself into the councils of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment."

Fourth, much closer to the mark, but ignored by the court below, is *O'Brien v. United States,* 386 U.S. 345, wherein the FBI monitored a single conversation of an accused with his attorney concerning bail application. This Court summarily vacated and remanded for new trial, despite the Solicitor General's representation that the conversation "was not mentioned in any FBI report nor were its contents communicated to attorneys for the Department of Justice, *including those who prosecuted this case." Ibid* (italics added). See also, *Black v. United States,* 385 U.S. 26; *Roberts v. United States,* 88 S. Ct. 1 (No. 330, this Term).

Fifth, reliance below upon Osborn's belated disclaimer on appeal of any "wrongful intent" by the Government, is in plain disregard of the District Court's express findings. Judge Northrop, who heard the testimony of both Osborn and Gordon, was "unimpressed with the Government's apparent view that its actions were entirely proper", stated "that had the facts made known at these hearings been presented after conviction instead of before trial, the Court would have granted a new trial", and held Osborn accountable for "the Government's wrongful conduct" and the "wrongful taking of the documents" (App. C, *infra,* pp. 46-47, 49).[3] It is astonishing that the court below would ignore these findings and reach an opposite conclusion on Osborn's say-so. His unsworn disclaimer in oral argument, on behalf of himself and the IRS agents, derives no colorable support from the record. Since the truth had to be pried out of the participants, whose unsupervised acts were cloaked in secrecy, saddling Petitioner with the burden of proving "wrongful intent" is as unrealistic as it is unfair that his road to prison should be paved with Osborn's retrospective good intentions.

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[3] Earlier in the hearing Judge Northrop remarked "that the action that the Government took was certainly reprehensible in this case."

Moreover, the attempted distinction between "wrongful intent" and "an extreme, even stupid, error of judgment" is much too thin to satisfy the Sixth Amendment or repair erosion to the adversary system. "There is no place in our system of criminal justice for prosecutorial misconduct." *Nash v. Illinois*, 88 S. Ct. 222, 223 (No. 163, Misc., this Term) (Fortas, J., dissenting). This Court is "not limited in our review of constitutional errors in state criminal proceedings to those errors which flow from 'prosecutorial bad faith or intentional misconduct.'" *Burgett v. Texas*, 88 S. Ct. 258, 262-3 (No. 53, this Term) (Warren, C.J., concurring). Nor does vindication of rights in federal proceedings depend upon affirmative proof of prosecutorial "wrongful intent".

> "We recognize that the prosecutor in this case was faced with a real dilemma * * *. We do not question that he then acted with what must have seemed high motives, and certainly with active diligence. But high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel." *Caldwell v. United States, supra*, 205 F. 2d at 879.

Sixth, the "substantial prejudice" test applied below is in conflict with *Glasser v. United States*, 315 U.S. 60, 75-76, in which this Court held:

> "To determine the precise degree of prejudice sustained * * * is at once difficult and unnecessary. The right to have the ['untrammeled and unimpaired'] assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

When each of the main participants in a federal prosecution admit to having studied defense counsel's work product, it is submitted that the ensuing trial is inherently saturated with prejudice, "substantial" or otherwise. The

contrary holding below clashes with the decisions of every circuit to pass on an analogous situation. *Coplon v. United States,* 191 F. 2d 749, 759 (D.C. Cir. 1951), cert. denied, 342 U.S. 926; *United States v. Lebron,* 222 F. 2d 531, 534 (2d Cir. 1953), cert. denied, 350 U.S. 876; *United States v. Venuto,* 182 F. 2d 519, 522 (3rd Cir. 1950).

Seventh, the "remedial action" below was wholly ineffectual under the circumstances. This is obviously not a case like *United States v. Blue,* 384 U.S. 251, in which suppression wipes the slate clean. Here, as in *Caldwell v. United States, supra,* 205 F. 2d at 881, "the surreptitious effort was not designed to get evidence", but was designed to acquire knowledge of Counsel's mental impressions, legal theories, and strategems. The prosecution went to trial with full knowledge of its adversary's case — strong points and weaknesses, contemplated proof at trial, and Counsel's plans to meet the Government's case. An order suppressing tangible evidence is singularly inappropriate where the matter to be suppressed does not remotely qualify as evidence. Rule 41(e), F.R. Cr. P., "is calculated to prevent, not to repair." *Elkins v. United States,* 364 U.S. 206, 217. By its own terms, the Rule is designed only "to suppress as evidence" but does not purport to reach the irreparable situation where the trial strategy and defense preparations of Counsel have been laid bare to the prosecutor and his chief witnesses. *United States v. Simon, supra,* 262 F. Supp. at 76-77. Even when it is merely a question of tainted evidence, *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392, admonishes that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that *it shall not be used at all.*" *Silverthorne* outlaws not only the tangible fruits, but rejects the notion adopted below that the prosecution "may study

the papers before it returns them, copy them, and *then may use knowledge that it has gained*" to try the case and secure conviction. *Ibid* (italics added). Unlike *Silverthorne*, wherein documents seized by a U. S. Attorney were immediately court-impounded, Osborn examined the file in depth, studied the papers several weeks before being ordered to return them, investigated leads, and admittedly used information to resolve inconsistencies in his own net worth analysis. Suppression of material copied was a token price to pay for his advance knowledge and ill-gained insights into the defense camp. In the pre-trial hearing Osborn so informed the court:

> "Here we may have gotten some free discovery. We did get some free discovery. I have already promised not to use what we did obtain. Of course, we have the free discovery and can't dissipate that from our minds."

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted, that the argument in *Mathis v. United States* (No. 726, this Term) should be postponed, and that the two cases should be set for argument consecutively.

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APPENDIX A

Opinions Below

Opinion of Court

(Filed May 19, 1967)

(378 F. 2d 612)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee,

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Edward S. Northrop, District Judge.

(Argued March 6, 1967. Decided May 19, 1967.)

Before Boreman, Bryan and Craven, Circuit Judges.

Norman P. Ramsey (Thomas Waxter, Jr., and H. Thomas Howell on brief) for Appellant, and Ronald T. Osborn,

Assistant United States Attorney, (Thomas J. Kenney, United States Attorney, Arthur K. Crocker and Clarence E. Goetz, Assistant United States Attorneys, on brief) for Appellee.

CRAVEN, Circuit Judge:

Graziano Mancuso was convicted by a jury of attempting to evade income taxes for the years 1956 through 1960.[1] In this appeal he attacks his conviction on two broad grounds: (1) insufficiency of the Government's case based on the net worth method of proof, and (2) misconduct of Government agents amounting to a denial of his Sixth Amendment right to the effective assistance of counsel, his Fifth Amendment right not to incriminate himself, and his Fourth Amendment right to be secure from unreasonable search and seizure.

I.

The evidence was amply sufficient for the jury to have found that the defendant had been since 1945 the dominant member of a family partnership, V. Mancuso & Sons, a barber supply business in Baltimore; that the defendant's brother, Nicholas, was also a partner, and his son, Vincent, Jr., became a partner in 1958; and that the defendant's father, Vincent Sr., who was described as a "limited partner" from 1945 until 1958, when he retired from the business, was salaried during this time and did not share in the profits. The defendant testified that ninety-eight percent of all partnership receipts were in cash.

The Government's comparative net worth analysis of the defendant showed an increase in personal net worth over the five years for which prosecution was undertaken of approximately $63,000, of which some $52,000 was shown as

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[1] He was indicted and convicted on five separate counts under § 7201 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7201, and was sentenced to one hundred and eighty-three days imprisonment.

derived from unreported taxable income.[2] The consistent increases in the defendant's personal net worth were attributed by the Government almost exclusively to income from the family partnership.

The Government ascribed $19,000 of the growth in the defendant's net worth over the five year period to increases in the value of his share of the partnership capital. The Government's personal net worth analysis on the defendant included in each year as one asset an apportioned share of the then current partnership capital.[3]

The defendant maintains that there was a complete lack of evidence to support the Government net worth schedules which were therefore improperly admitted in evidence, and thus his case was erroneously permitted to go to the jury. The challenge to the Government's proof relates specifically to determination of his interest in the partnership capital and its use in calculating his personal net worth. Other assets (and expenditures) in the Government per-

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[2] The Government's comparative net worth schedule for the defendant showed the following:

Date	*Defendant's Share of Partnership Net Worth (capital)*	*Total Personal Net Worth (Assets less liabilities and depreciation)*	*Increase in Personal Net Worth During Year*	*Understated Taxable Income*
12/31/53	$26,130.	$83,655.		
12/31/54	30,371.	90,922.	$ 7,267.	$ 6,535.
12/31/55	32,581.	101,578.	10,657.	10,298.
12/31/56	38,393.	113,141.	11,563.	9,735.
12/31/57	42,759.	144,531.	31,390.	26,108.
12/31/58	47,393.	153,743.	9,212.	10,036.
12/31/59	48,342.	157,132.	3,389.	4,177.
12/31/60	50,511.	164,437.	7,305.	2,022.

Note: Figures have been rounded off to the nearest whole number.

In calculating the defendant's taxable income in a given year, the Government in its net worth schedule adjusted the increase in his personal net worth by adding expenditures which do not result in asset accumulation (*e.g.*, daily living expenses and purchases of gifts for other persons) and subtracting, *inter alia*, the defendant's personal exemptions and the standard deduction.

[3] See note 2 *supra*.

sonal net worth schedule were based on direct evidence introduced at trial.

The defendant concedes that amounts assigned by the Government to business assets, liabilities, and depreciation reserve in constructing a comparative net worth statement for the family partnership were proved by competent evidence at his trial.[4] He contends, however, that key "assumptions" made by the Government in establishing his share in the partnership capital are unsupported by direct evidence.

The Government's theory allocated to the defendant and Nicholas Mancuso each one-half of the partnership capital on December 31, 1953, the starting point in its net worth schedules. Thereafter they were credited with an even one-half of the increments in partnership capital until the addition of Vincent, Jr. in 1958, after which one-third was allotted to each. However, the Government analysis did not assign to Vincent, Jr. any part of the accumulated firm capital. Although the family business began as Vincent, Sr.'s proprietorship, the Government theory does not allow him an interest in the firm capital during the prosecution period.

The jury accepted the Government's theory and, we think, was entitled to do so. It is true that there was a scarcity of direct evidence relating to the ownership interests in the partnership capital. All the evidence was to the effect that there was no capital account as such, and the partnership tax returns did not include a capital account reconciliation.[5] However, circumstantial evidence was plainly sufficient to support the Government's inferences.

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[4] The Government prepared a comparative net worth statement on the partnership from which was determined the figure listed as "Partner's Share in V. Mancuso & Sons" (termed "Defendant's Share of Partnership Net Worth" in note 2 *supra*) among the assets in the Government's personal net worth schedule on the defendant. The Government's partnership statement, however, computed partnership capital solely from assets and liabilities at the end of the tax years in question and did not include an examination of capital contributions and withdrawals, if any.

[5] The defendant himself testified at trial that there was no capital account. He also testified that he told Government agents that there

The Government's position that Vincent, Sr. was without a capital interest in the prosecution years is strongly supported by evidence at trial. The partnership tax returns for the years under examination show that he was salaried and did not receive a part of the partnership profits. Furthermore, Internal Revenue Agent Gordon testified that he had an "absolute disclaimer" from the defendant of any interest of his father, Vincent, Sr., in the partnership. Agent Gordon further testified that the defendant had told him that beginning in 1945 Vincent, Sr. had "gradually relinquished and he turned [the partnership over] to the two . . ." sons and that Vincent, Sr. remained a "limited partner" and received a salary for little things he did about the place.

The inference that Vincent, Jr. did not acquire any part of the accumulated firm capital on acceptance as a partner in 1958 rests on testimony of Agent Gordon that Vincent, Jr. had told him that he brought nothing into the partnership. This was not denied by the defendant.

There was more than sufficient evidence at trial showing the defendant's dominance of the business for the jury to infer that he had at least an even one-half interest in the partnership capital in 1953 and that he owned an equal part of annual increments in firm capital. So comprehensive was the defendant's control over affairs of the family business, especially the financial ones, a reasonable inference would have been that the partnership-in-name was in fact his sole proprietorship. The defendant was proved to be the only active partner who could and did write checks on the business checking account and who could draw on the partnership savings account.[6] The defendant testified that he alone

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was "just a family arrangement". Internal Revenue Agent Gordon testified that "[a]ll we were able to learn from the whole partnership, all the members, was that they maintained no capital account."

[6] Both business accounts, records of which were introduced in evidence by the Government, are in the joint names of Vincent, Sr. and the defendant. However, the defendant testified that he was the only one who wrote checks and Agent Gordon testified that the defendant told him that Vincent, Sr.'s name had been placed on the savings account, "although he was no longer truly a partner, and it was not the father's money, . . . out of respect, so that in the event anything happened to . . . Graziano Mancuso, the father could be expected to see that everyone was taken care of."

maintained the partnership books and records. He did not account to other members of the firm.[7]

Granting to defendant the benefit of any doubt, the Government attributed to him on its net worth theory only an equal part of the initial partnership capital and increases in net worth. The apportionment made by the Government followed the distribution of profits as reported on the partnership tax returns which were in evidence, and as stated in testimony by Agent Gordon, conformed to the ordinary legal presumption that in absence of evidence of an agreement to the contrary the partners' interests are equal.[8]

The defendant's principal defense was the familiar cash hoard and gift explanation. He admitted on the witness stand that the immediate source of the funds which inflated his personal bank accounts and paid for physical assets appearing on the Government net worth schedule during the years 1953 through 1960 was the partnership checking account. However, he maintained that the money withdrawn for these purposes did not represent partnership profits but were funds placed in the business accounts for convenience and actually derived from funds acquired before the prosecution period or received as gifts from members of his family.[9]

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[7] Agent Gordon testified that the defendant told him that "he maintained the books and records, he was the only one who could write checks and he generally ran the business, in his words. He prepared all returns for the business, except the state and federal income tax returns and the partnership returns, which were prepared by . . ." a CPA from his records.

[8] See Uniform Partnership Act § 18: 68 C.J.S. *Partnership* § 85(b), at 526-27 (1950).

[9] The defendant, for example, testified that he received from his father during the prosecution years some $9,000, which was placed in the partnership checking account. He also testified that his wife had received a large sum of money — around $20,000. — from her mother which was turned over to him from time to time and eventually found its way to the business checking account, and from there into the purchase price of a home.

The following dialogue occurred at the close of the defendant's testimony:

> *The District Judge:* "And you say that most of the money that we are concerned with here came either from your father or your in-laws, is that right?"
>
> *The Defendant:* "Yes, Your Honor."

Inconsistently and in contrast to the position taken by his client, the defendant's counsel advanced the theory at trial and before this court that the Government had not refuted the possibility that the personal assets of his client could have been acquired with partnership capital which had accumulated to his credit before the starting point in the net worth analysis, December 31, 1953. The Government in fact concedes[10] that the defendant would *not* be delinquent in reporting income if it is presumed that in 1953 he owned the entire partnership capital and thereafter when taking funds from the partnership account to enhance his personal asset position drew only on his accumulated capital and took no partnership profits in excess of those reported on his tax return. This was the theoretical possibility illustrated by a hypothetical net worth schedule used by counsel for the defense at trial. Such a possibility appears to be controverted, however, by the defendant's own explanation of asset accumulation. Suffice it to say that the jury — within its competence — accepted neither defense theory.

Because of the omission of the defendant to maintain adequate records the Government was forced to proceed in its prosecution with the net worth method of proof. Its case, therefore, was necessarily grounded in circumstantial evidence. The jury considered the evidence bearing upon the defendant's partnership interest along with the evidence of other assets and purchases, and weighing the defense theories, made the ultimate inference, with which it was satisfied beyond a reasonable doubt, that during the years covered by the indictment the defendant had received substantially greater income than he reported on his tax returns.

What this court said in *Moore v. United States* is pertinent:

> "If [circumstantial evidence] be sufficient to support an inference of guilt and the defendant fails to offer a reasonable explanation consistent with innocence, such failure may be considered by the trier of fact. It is not necessary, in appraising the sufficiency of the evidence,

[10] The concession was made in oral argument before this court.

> that this court be convinced beyond a reasonable doubt of the guilt of the defendant. The question is whether the evidence, construed most favorably for the prosecution, is such that a jury (or trial judge) might find the defendant guilty beyond a reasonable doubt." 271 F. 2d 564, at 568 (4th Cir. 1959) (case citations omitted).

We stated in *Bell v. United States* that [a]n estimate of the taxpayer's net worth as the means of determining his income is resorted to in the absence of accurate records which it is his duty under statute to make and to preserve, and by its very nature it is an approximation; . . . the absence of proof of the exact amounts of unreported income is not fatal if there is *substantial evidence tending to prove the defendant's guilt beyond a reasonable doubt.* 185 F. 2d 302, 308-09 (4th Cir. 1950) (emphasis added).

We have in our review of this case heeded the Supreme Court's admonition that courts should closely scrutinize use of the net worth method of proof because "it is so fraught with danger for the innocent." *Holland v. United States,* 348 U.S. 121, 125 (1955). We have examined the district court's charge and find it especially clear and inclusive of all the elements set out in *Holland,* 348 U.S. at 129. We conclude that the Government established with sufficient certainty the defendant's opening net worth. See *Holland v. United States,* 348 U.S. at 132.

In addition, the Government in the present case tracked "down relevant leads furnished by [the defendant] — leads reasonably susceptible of being checked, which if true would establish his innocence." *Holland v. United States,* 348 U.S. at 135-36. There was plentiful evidence supporting the inference that the defendant's net worth increases were "attributable to currently taxable income." *Holland v. United States,* 348 U.S. at 137.

There was sufficient independent evidence, in addition to the defendant's own statements, for the jury to find that the Government had established the elements of its case beyond a reasonable doubt, including the element of willfulness which was the compelling inference from the consistent pattern of underreporting. See *Smith v. United States,* 348 U.S. 147 (1954).

II.

The defendant's contention that he was denied Fourth, Fifth, and Sixth Amendment rights is based in large part on the conduct of an Assistant United States Attorney in examining and copying certain defense files. Contemplating using as a witness Milton Duke, C.P.A., who had prepared defendant's tax returns for many years, Government counsel interviewed him on more than one occasion. On September 7 or 8, 1965, Duke came alone and willingly to the United States Attorney's office and brought his file on defendant. He voluntarily disclosed it to the Assistant United States Attorney and Internal Revenue agents. Included were net worth schedules prepared at the request of defendant's counsel. The file also contained letters to Duke from defendant's counsel which Agent Gordon said the Government "studiously avoided looking at. . . ."

The Government agents made copies of the defense net worth schedules and compared them with their projected ones. The matter was not kept secret. Defense counsel was promptly and fully advised of the occurrence, and as promptly responded with a motion to suppress. At a two-day hearing on the motion, the district court heard evidence and sensibly considered alternative remedies:

(a) evening things up by requiring the Government to produce *its* net worth statement;

(b) suppressing the physical evidence obtained from Duke and any of its fruits;

(c) dismissal of the indictment — urged by defense counsel to be the only adequate remedy.

The district judge rightly concluded that sufficient protection would be afforded defendant short of a dismissal that would end the cause and exculpate the defendant. He ordered that "the net worth statements and all related papers, whether incriminatory or not, prepared by Mr. Duke at the direction of [defendant's counsel] and for [his] use in the defense of [the defendant], are ordered suppressed as is any evidence that might have been revealed

by those papers." The defense was given the right to object during the trial to any evidence it felt the Government obtained from the documents. The district court, in addition, granted the motion for production of the *Government* net worth schedules. Moreover, the court ordered a continuance for at least sixty days to give defendant's counsel an opportunity to acquire a new accountant.[11]

We need not consider the underlying questions of whether the schedules copied were in fact counsel's work product, and if so, privileged, or whether there was a waiver. Clearly, any prejudice resulting from an assumed violation of the Fourth or Fifth Amendments was cured by the extraordinary remedial order of the district court. "[N]umerous precedents ordering the exclusion of . . . illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." *United States v. Blue,* 16 L. Ed. 2d 510, 515 (1966). Moreover, the Supreme Court has never "expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing[12] will not reveal it." *Hoffa v. United States,* 17 L. Ed. 2d 374, 382 (1966).

The defendant next complains that he was denied his Sixth Amendment right to the effective representation of counsel by Government use of information gathered in several interviews with Milton Duke in the investigative stage of the proceedings and as a prospective Government witness during preparation for trial. Since an accountant is indispensable to defending a net worth case, it is argued that getting the cooperation of the accountant is the same

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[11] The court also forbade the Government to consult further with Milton Duke. We have no occasion to review the propriety of this unusual sanction since the Government took no exception to it.

[12] The defendant entrusted Duke only with his tax records. He confessed no wrongdoing to Duke, or if he did, his confidence was not breached.

as penetrating the constitutionally protected relationship of attorney-client. We think not. There was here no "surreptitious invasion by a government agent into the legal camp of the defense", nor indeed any "government intrusion" — gross or otherwise — upon the confidential relationship between defendant and his counsel. *Hoffa v. United States*, 17 L. Ed. 2d 374, 384 (1966). The Government engaged in no electronic surveillance, wire tapping, or deception. Compare *Massiah v. United States*, 377 U.S. 201 (1964); *Caldwell v. United States*, 205 F. 2d 879 (D.C. Cir. 1953); *Coplon v. United States*, 191 F. 2d 749 (D.C. Cir. 1951). Certainly on the facts of this case there was no infringement of the Sixth Amendment right to counsel.

Defendant was indicted on April 9, 1963. The district court refused to suppress evidence gathered and statements made to Internal Revenue Service agents at two conferences with the defendant in June and December 1961. Defendant asserts that his right not to be compelled to be a witness against himself was abridged because he was insufficiently warned. The defendant was accompanied by an attorney and his accountant (the same Milton Duke) when he first met with Internal Revenue agents. The uncontroverted testimony by Agent Gordon was that at this meeting he advised the defendant "that under the Constitution of the United States he may refuse to answer any question the answer to which will tend to incriminate him. . . ." We think this more than sufficient.

The defendant was not in custody. He attended the meetings under no compulsion save his own or counsel's judgment that it was in his best interest to do so.

The hearing on the motion for suppression of evidence and the trial in the present case were conducted after the decision of the Supreme Court in *Escobedo v. Illinois*, 378 U.S. 478 (1964), but prior to the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Because of the time sequence, *Escobedo* is more pertinent than *Miranda*. *Johnson v. New Jersey*, 384 U.S. 719 (1966). Though these cases involved state prosecutions and were decided under the Fourteenth Amendment, the principles may apply in federal tax cases.

See S. Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybird,* 76 Yale L.J., 1, 37 (1967).

But *Escobedo* and *Miranda* do not apply to a tax audit, *i.e.,* an investigation by revenue agents of a taxpayer's tax returns and records for the purpose of determining whether or not additional taxes are due and whether or not a crime has in fact been committed. See *Kohatsu v. United States,* 351 F. 2d 898 (9th Cir. 1965). Neither suggest a duty to warn one who, like the defendant, is *not* under arrest and whose freedom of action is not curtailed.

If it be assumed that defendant and his lawyer were unaware of his legal right to resist the investigation, the result is the same. That defendant subjectively may not have known of his rights does not vitiate his voluntary disclosures made with advice of counsel. *United States v. Spomar,* 339 F. 2d 941 (7th Cir. 1965), *cert. denied,* 380 U.S. 975 (1965).

The courts uniformly hold that a taxpayer's ignorance of the nature of an investigation by the Internal Revenue Service and of his legal right to resist "is insufficient ground for suppression of evidence voluntarily given." S. Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybird,* 76 Yale L.J. 1, 36-37 (1966); see, *e.g., Turner v. United States,* 222 F. 2d 926 (4th Cir. 1955).

At the time of these conferences no decision had been made to prosecute. "Explicit warnings need not be given concerning possibilities that may never come to pass." *Greene v. United States,* 296 F. 2d 841, 842 (2d Cir. 1961).

Revenue agents, during the course of an investigation of a taxpayer's returns, and prior to determining upon criminal prosecution, "have no duty to apprise a taxpayer that he need not furnish requested information and that if he does furnish such information it may be used against him in criminal proceedings." *United States v. Spomar,* 339 F. 2d 941, 942 (7th Cir. 1964), and cases cited therein.

Affirmed.

PER CURIAM OPINION OF COURT

(Filed December 8, 1967)

(not yet reported)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee.

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

(Argued October 4, 1967. Decided December 8, 1967.)

Before Haynsworth, Chief Judge, Sobeloff, Boreman, Bryan, Winter, Craven and Butzner, Circuit Judges.

Norman P. Ramsey (Thomas Waxter, Jr., and H. Thomas Howell on brief) for Appellant, and Ronald T. Osborn and Clarence E. Goetz, Assistant United States Attorneys, (Stephen H. Sachs, United States Attorney, on brief) for Appellee.

PER CURIAM:

Upon rehearing en banc the opinion of the panel as reported in 378 F. 2d 612 is adopted as that of the court. To that opinion we append the following:

> After the remedial action taken by the district judge, we are satisfied that the record does not disclose, under the rules laid down in *United States v. Blue*, 384 U.S. 251 (1966), and *Hoffa v. United States*, 385 U.S. 293, *rehearing denied* 386 U.S. 951 (1967), such substantial prejudice to the defendant's Fourth, Fifth, and Sixth Amendment rights that it is appropriate to quash the prosecution and discharge the defendant as a matter of constitutional right. But that is not necessarily the end of the matter.
>
> The government sent for and interviewed defendant's accountant, itself a proper procedure, and made legitimate inquiry concerning his knowledge of defendant's tax returns for the prosecution years. But the government did more. Whether at its instance, or by the voluntary act of the accountant, the government availed itself of the accountant's entire file, *including the accountant's communications with counsel and work papers concerning the preparation of a defense.* The government gave notice to defendant's counsel of what was done, but only after it was done.
>
> In argument, the government expressly disclaimed wrongful intent in what it did, and candidly admitted an extreme, even stupid, error of judgment. The government's deficiencies in the proper conduct of this prosecution were not erased by notice to counsel of what was done, after it was done. Nevertheless, we are persuaded that in this case wrongful intent was absent. Except for such absence and the lack of substantial prejudice, we would dismiss the prosecution and discharge the defendant under our supervisory power over the district courts of this circuit.

APPENDIX B

The Judgment and Orders Below

Order Staying Mandate Pending Timely Filing of Petition for Rehearing

(Filed May 29, 1967)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee.

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore

---

Upon the motion of the appellant by his counsel, and for cause shown,

It is ordered that the time within which the appellant may file a petition for rehearing be, and it is hereby, extended to and including June 5, 1967.

Further ordered that the mandate be, and it is hereby, stayed pending the timely filing of the petition for rehearing.

Herbert S. Boreman,
United States Circuit Judge.

A true copy,
Teste:

Maurice S. Dean,
Clerk, U. S. Court of Appeals
for the Fourth Circuit.

ORDER GRANTING PETITION FOR REHEARING EN BANC

(Filed June 23, 1967)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,
Appellee,

v.

Graziano J. Mancuso,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore

---

Upon consideration of the petition of the appellant for rehearing en banc, and for cause shown,

It is ordered that the appellant's petition be, and it is hereby, granted and the case set down for rehearing at the October session of this Court.

Leave is hereby granted to the respective parties for filing supplemental briefs if so desired provided the supplemental brief of the appellant be filed in the Clerk's office on or before August 11, 1967, and the supplemental brief of the appellee be filed in the Clerk's office on or before September 11, 1967.

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

A true copy,
Teste:

MAURICE S. DEAN,
Clerk, U. S. Court of Appeals
for the Fourth Circuit.

Order Affirming Judgment of Conviction

(December 8, 1967)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee.

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore

---

Upon rehearing en banc,

It is ordered that the opinion heretofore filed and reported in 378 F. 2d 612 be supplemented by an addendum as contained in the opinion filed herein this date.

It is further ordered that the judgment of conviction be, and it hereby is, affirmed.

J. Braxton Craven, Jr.,
United States Circuit Judge.

A true copy,
Teste:

Margaret L. Davis,
Chief Deputy Clerk,
U. S. Court of Appeals for
the Fourth Circuit.

ORDER STAYING ISSUANCE OF CERTIFIED COPY OF JUDGMENT IN LIEU OF MANDATE PENDING TIMELY APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI

(Filed December 18, 1967)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee,

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore

---

Upon the motion of the appellant by his counsel, and for cause shown,

It is ordered that the issuance of a certified copy of the judgment in lieu of a mandate be, and is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court within the time prescribed by law.

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

A true copy,
Teste:

MARGARET L. DAVIS,
Chief Deputy Clerk,
U. S. Court of Appeals for
the Fourth Circuit.

APPENDIX C

Oral Opinion of The District Court

Oral opinion of the United States District Court for the District of Maryland, rendered on October 21, 1965, by the Honorable Edward S. Northrop, District Judge. The opinion is unreported.

---

(33) Proceedings of October 21, 1965

* * * * * *

(33)

OPINION OF COURT ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND TO DISMISS THE INDICTMENT

All right, let me say at the beginning that the problems raised by virtue of the Government's acquiring these papers, which were the work product of the defense, the taxpayer, cannot be condoned by this Court and it did raise a problem, of course, which necessitated this lengthy hearing and this adjournment to reappraise the situation and submission of briefs on the part of the Government and of the taxpayer. It certainly is fortunate that this does not occur very often and that it is a rare case from that standpoint.

Now, I am going to discuss the motion, first of all, I will direct my attention to the statutory argument concerning Section 7605 (b). I think the Petitioner's argument in reference to the suppression of the evidence in connection with that statute cannot stand.

That Section reads:

No taxpayer shall be subjected to unnecessary (34) examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

From a reading of the legislative history of that Section and cases construing it, I cannot hold that the office audit of the 1958 and 1959 returns was an inspection of the taxpayer's records of the type contemplated by Section 7605 (b). The legislative history indicates that the evil to be corrected by its enactment was the harassment of taxpayers caused by repeated visits of Revenue Agents, the interference caused by numerous examinations of taxpayers personal or business records, and things like that.

For a summary of the legislative history, I refer you to De Masters versus Arend, 313 F. 2d 79, which is a Ninth Circuit case, decided in 1963, and more particularly pages 85 to 88.

I need not go into the language that appears on those pages, but there are references to various remarks of Congressmen and Senators in connection with the Section, and it certainly would appear that it is directed at an examination, what is called a field audit of the books and records, and not merely an office audit of the tax returns, and nothing (35) more, which was the case which occurred in reference to this case.

Of course, there is testimony in this case as to — that the Internal Revenue Service thought that a reopening letter was needed in this instance, although it is not completely clear just what the view of the Service is.

However, even if the Service has indicated that its Agents are to send reopening letters in situations such as this, that practice is not a statutory requirement. Were the statute less clear, the administrative practice would be accepted by this Court as indicating the proper construction. The statute, however, is sufficiently clear to indicate that the cursory check made in the 1958 and 1959 returns of Mr. Mancuso was not an examination or examinations of the type discussed in Section 7605 (b).

Nor does Section 7605 (b)'s restriction on unnecessary investigations help taxpayer in this case. As stated in Arend, which I have cited before, at page 87:

An investigation cannot be said to be, quote, unnecessary, end quote, if it may contribute to the accomplishment of any of the purposes for which the Commissioner is authorized by statute to make inquiry. The legislative history, though sparse, tends to confirm the impression that Congress was primarily concerned with protecting taxpayers from examinations which were (36) unnecessary in the sense that they followed prior investigations of the same matter which had established that there was no basis for liability.

The subjects of the office audit and the later investigation were quite different. The office audits consisted only of a mathematical checking or comparison of figures, while the later investigation was concerned with a thorough examination of taxpayer's affairs.

So, therefore, I deny the motion to suppress the evidence obtained, as counsel has put it, in violation of 7605 (b).

Now, directing attention to the next contention of the taxpayer, namely, that there has been a violation of the Sixth Amendment, particularly, that the taxpayer Defendant in this instance has been deprived of effective representation, I find — the Court also finds against the Petitioner on this point.

There is no indication that Petitioner requested counsel during any of his interviews with the Revenue Agents; it follows, then, that there was no denial of a request for counsel.

Although he did not request counsel, Petitioner had established that he was not advised explicitly of his right to counsel until quite late in the investigation.

Now, I am directing my attention then again to the (37) suppression of the evidence in accordance with the interviews.

He had, however, been present at conferences between Revenue Agents and his brother, who was his partner, at which his brother was represented by counsel.

Further, his accountant had been present at an earlier interview with taxpayer, as well as present at interviews with his brother, although a power of attorney had not been filed by the accountant.

Thus, I find it difficult to believe that Petitioner was unaware of his right to counsel.

Even so, this Circuit has not ruled on whether and when one must be advised of his right to counsel, but has applied Escobedo only where a request has been made and that request has been denied.

How the Circuit will rule later on is anybody's guess, but Mrs. Ross, I must correct the first part of this in saying that I am directing my attention when I made the foregoing remarks to the Petitioner's contention that counsel was not present at the taxpayer's interview with the Agents which occurred in June and December, 1961, which he has urged also as a reason for suppression of the evidence obtained as a result of those interviews, and I am denying the motion to suppress in reference to that claim.

Now, the Sixth Amendment, and I make that finding and, of course, I cite in that connection the Davis case (38) which is out of this Circuit, I don't feel it is the same thing as an Escobedo situation, the facts themselves.

Now, I turn to Petitioner's claims relating to the taking and copying of certain papers prepared by taxpayer's accountant.

And I must treat this motion as a motion to dismiss and I think counsel for the Defendant taxpayer has agreed that the Court should treat it in that manner.

The Court must state that it is unimpressed with the Government's apparent view that its actions were entirely proper. Particularly distressing is the Government's statement on page three of its brief that, with the possible exception of net worth statements, quote, the Government obtained from Mr. Duke only what it would have obtained by compulsory process.

I must say that this — of course, this argument would, if sustained, excuse even a forcible entry into a taxpayer's place of business and a taking of his books and records, which are subject to compulsory process, and I think Mr. Ramsey is quite correct that the process would not even have been available to the Government at this particular posture of the case.

Obviously, the availability of a legal means to secure evidence or information does not excuse the use of an illegal means to secure that same evidence, even if it were (39) not true that compulsory process could not be used during the period which we have under surveillance here, namely, the period from the indictment to the trial.

Suffice it to say that had the facts made known at these hearings been presented after conviction instead of before trial, this Court would have granted a new trial.

Now, the papers were copied, as appears from pages twelve and thirteen of the Government's brief, after Mr. Osborn had, quote, requested, end quote, Mr. Duke to permit the copying. Thus, the situation is somewhat different than in those cases where a private citizen, on his own initiative, makes certain evidence available to the Government.

For this reason, and because of the distaste the Court feels for the copying of the papers prepared for Mr. Ramsey, the net worth statements and all related papers, whether incriminatory or not, prepared by Mr. Duke at the direction of Mr. Ramsey and for Mr. Ramsey's use in the defense of Graziano Mancuso are ordered suppressed, as is any evidence that might have been revealed by those papers. All papers involved shall be turned over to the Defendant.

The Court, of course, treats Defendant's motion to suppress as, in the alternative, a motion to dismiss the indictment. After carefully considering the memoranda prepared by counsel and the facts and arguments advanced at the hearings, the Court concludes that, in spite of the (40) Government's wrongful conduct, it need not follow that

the indictment should be dismissed. There is no reason to visit such a drastic penalty upon the public, and I quote from the recent case, the very recent case of the United States versus Ferguson, 243 F. Supp. 237, 238, a District of Columbia case decided in 1965.

I will accept Defendant's argument that where, at the accused's trial, there has been a possibility of prejudice resulting from a possible denial of a fundamental Constitutional right, a new trial, at which the prior defects are to be corrected, must be awarded to the convicted Defendant. I also agree that when it appears that the denial of the accused's rights has been so fundamental that a retrial would necessarily be unfair to the accused, the accused must go free. The usual remedy to protect those convicted in proceedings at which rights have been violated is a new trial free of the original defect; seldom is the convicted accused summarily freed.

For example, in Caldwell versus United States, 205 F. 2d 879, D.C. Circuit, 1953, one who had been present at conferences between the accused and his counsel, and who had been made aware of much of the strategy to be used by the defense, reported all that he had learned to Government prosecutors. The accused was convicted at trial. The Court, finding that the accused had been denied the effective (41) assistance of counsel, felt that a new trial was the proper remedy and that a motion for a judgment of acquittal had been properly denied in the absence of a showing of prejudice to the defense of such a nature as would necessarily render a subsequent trial unfair to the accused.

This Court feels that in order to free this accused before trial, thereby denying the public its day in court, there must be a reasonable likelihood that the assistance of counsel cannot be effective and that the trial would necessarily be unfair. While it was most definitely an error in judgment for the Government to have copied the documents in question, I find no reasonable likelihood of actual prejudice if the trial is allowed to go forth.

The copies of the documents are to be turned over to defense counsel. The Government is instructed not to use at the trial any information it may have obtained from the documents. Defense counsel, of course, has the opportunity at trial to object to the introduction of any evidence he feels the Government obtained from the documents. In this way, the Court feels that no reasonable likelihood of prejudice will result from the Government's wrongful taking of the documents.

The motion to dismiss the indictment must, therefore, be denied at this juncture.

I say denied without prejudice for Mr. Ramsey to (42) show at the trial that there has been actual prejudice and to renew his motion both for a — I mean, a motion to dismiss or a judgment of acquittal, as he may see fit, and make his record as he goes along.

As previously indicated, the Court is not pleased with the Government's obtaining and copying the net worth and other documents prepared by Mr. Duke for defense counsel.

Therefore, in fairness to all, and as the Court's method of indicating disapproval of the Government's action, the Court treats Defendant's motion for the suppression and the motion for dismissal of the indictment as also a motion for the production of the Government's net worth statements, and grants that motion.

The Court does not comment on the fact that in some Districts the Government is required, as a matter of course, to produce its net worth statements for the Defendant, but only states that in this case the Government statements will be made available to defense counsel, and the case will be set down for trial, and I also will grant Mr. Ramsey a continuance to get a new accountant, and I am now asking how much time he thinks he will need to get and locate a new accountant, or whatever he needs for trial?

(Mr. Ramsey) I would like to give the Court as short a period as possible and at the same time try to be reasonable in allowing for it. I should think I would need (43)

sixty days, your Honor, and I would, frankly, like to be certain that the Court would understand if I came back and asked for another thirty, if the accountant indicated he needed additional times, I would think in terms of first locating him, then conferences, and then the reviews, but being realistic, sixty days, and I would anticipate I might have it by sixty, in which event, the Court could set the case for trial, I might ask for an additional thirty, but I hope not.

(The Court) Now, is that agreeable to the Government?

(Mr. Osborn) Yes, your Honor.

Your Honor, before it slips my mind, I think it might be important to make the papers that were turned over by Mr. Duke and have now been turned over to the Court, to make those the Court's exhibits, I believe Mr. Ramsey has other copies of the same documents.

(The Court) I have two copies here. Now, one copy — are these all the papers you have?

(Mr. Osborn) They are absolutely all the papers we obtained from Mr. Duke, your Honor.

(The Court) Now, one copy, as was brought out the last time, has notations on it that the Government has made.

(Mr. Ramsey) Yes, Your Honor.

(The Court) I think you saw those.

(44) (Mr. Ramsey) I looked at them while the witness was on the stand, yes, sir.

(The Court) What do you wish to do with these?

(Mr. Ramsey) Do you wish them made a sealed exhibit, Mr. Osborn?

(Mr. Osborn) I see no point in sealing them, but I think they should be the Court's exhibit rather than returned to you.

(Mr. Ramsey) Why not if I already have them?

(Mr. Osborn) Well, don't you feel they should be part of the record in the case?

(Mr. Ramsey) I feel they should, part of the record in the case, and I don't distrust you or Mr. Kenney or Mr. Crocker, but I don't want them—

(Mr. Osborn) Oh, I misunderstood, they should be sealed.

(The Court) The best way is to give them back to you, because I don't think they ought to be anywhere around here.

(Mr. Osborn) Then will they be part of the record if it goes on appeal?

(Mr. Kenney) If it goes on appeal, Your Honor, your Honor's action on the motions might be reviewed. I think the record ought to be complete and they should be marked as a Government's exhibit and sealed.

(45) (Mr. Ramsey) Mr. Kenney, as a matter of agreement, I would like to have at least one set of what was worked over for my file and, your Honor, I will return intact the various documents which are there and we can mark them as an agreed exhibit.

(Mr. Kenney) Fine.

(The Court) I am now handing, let the record show, to Mr. Ramsey and Mr. Ramsey will return them sealed as an exhibit.

Now, do you want to mark them now, Mr. Clerk?

(The Clerk) No, sir.

(Mr. Ramsey) They will be returned intact, your Honor, I will make one xerox copy of each and return the entire group to the Clerk, or the Court's chambers, whichever.

(The Court) Let the record show, along with the Government's memorandum, this Court received copies of Government's net worth statements, there were two copies, one that was made in June, I think, one net worth state-

ment made in June, the other one marked, that was made fairly recently, I don't know how recently.

(Mr. Osborn) Within the month of September it was completed, your Honor.

(The Court) Was it completed after the interview with—

(Mr. Osborn) I believe it was completed shortly (46) after the interview with Duke, but that interview and what flowed from it had nothing to do with any of the revisions on that statement, I would like to clarify that with Mr. Levitas who was primarily responsible for that net worth statement.

About when did you complete that, Mr. Levitas?

(Mr. Levitas) In September after a bank gave me a revised figure.

(Mr. Osborn) Was it before or after the discussion with Mr. Duke?

(Mr. Levitas) I believe it would be after.

(Mr. Ramsey) Let me follow that up, was it the result of looking at our net worth statement that you got your revised figure from the bank, Mr. Levitas?

(Mr. Levitas) No, sir.

(Mr. Osborn) Would you tell the Court briefly the nature of revisions?

(Mr. Levitas) It was the prior criminal year, the bank gave us a figure and later they came up with the actual exhibit which was different from the figure they gave us verbally, or rather, in a statement, that was not during the criminal years.

(Mr. Osborn) And that will be seen by comparison, your Honor.

(The Court) I have directed the Government to turn over its (47) net worth statements to Mr. Ramsey. Do you wish me to turn over these copies that I have? I have

marked on here that I have opened this statement on the 15th of October, 12:35 p.m., and sealed at 2:25 p.m..

(Mr. Osborn) Perhaps that should be retained, your Honor, as an exhibit, we could make additional copies for Mr. Ramsey.

(The Court) Well, then both statements must be turned over to Mr. Ramsey.

(Mr. Ramsey) That's perfectly agreeable, your Honor.

(The Court) The earlier and the other.

(Mr. Osborn) The Government will certainly comply with that, your Honor.

(The Court) Now, I think I have ruled on everything.

I have treated Mr. Ramsey's motion as a motion to suppress and denied his motion to suppress in reference to the papers and information, and all evidence which might have resulted from the interviews in question, and that I have denied both on the grounds that it was not in violation of 7605 (b) and on the ground that it did not violate the Sixth Amendment in connection with counsel being present at the interviews.

I then treated the motion of Mr. Ramsey as a motion to dismiss the indictment and denied that, feeling that there (48) has not been exhibited to the Court at this time actual prejudice, which I think is necessary under the circumstances.

In that connection, I have stated and restate again that this is without prejudice for Mr. Ramsey to make such motions as he feels are proper and necessary as the case goes along, and also for him to indicate what evidence, if it does come in, what evidence he considers is prejudicial and obtained as a result of the Government's going through the files of Duke and any information they might have gotten from Duke on Mr. Ramsey's defense of the case.

I have likewise treated the motion as a motion to produce and because of the situation obtaining here, namely, the Government having gotten certain papers, work products

of Mr. Ramsey, and because of that only, and not as a precedent in reference to these types of cases, I have ordered the Government to produce all net worth statements which they have in reference to Graziano Mancuso.

Furthermore, at the request of Mr. Ramsay I have postponed this case for sixty days and the Government has acceded to that, and if Mr. Ramsey finds himself in embarrassing circumstances, he may ask for addition time up to thirty days.

I, therefore, feel that under the circumstances he can get along with that time, and that's it, and I think that covers the whole matter which we have before us, does it (49) not?

(Mr. Kenney) I believe so, your Honor.

(Mr. Ramsey) I believe so, your Honor.

(The Court) Mr. Graham, you will take this particular paper and file it as an exhibit in these hearings.

(The Clerk) I will just list it as part of the exhibits of today and put it in the envelope.

(The Court) Gentlemen, in conformance with the opinion I have announced from the bench, will you please draw an order, Mr. Osborn, and submit it for signature, show it to Mr. Ramsey, let him mark it seen, and then present it to the Court.

(Mr. Ramsey) Thank you, sir.

APPENDIX D

CONSTITUTIONAL PROVISION, STATUTES, RULES OF COURT, AND REGULATIONS

Constitutional Provision

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Statutes

Section 7201 of the Internal Revenue Code of 1954, 68 A. Stat. 851 (1954), 26 U.S. Code Sec. 7201, provides as follows:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Section 7608(b) of the Internal Revenue Code of 1954, 76 Stat. 1143 (1962), 26 U.S. Code Sec. 7608(b), provides as follows:

> "(b) *Enforcement of laws relating to internal revenue other than subtitle E.*—
>
> "(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary of his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary or his delegate is responsible

is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

"(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are—

"(A) to execute and serve search warrants and arrest warrants, and serve subpoenas and summons issued under authority of the United States;

"(B) to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable ground to believe that the person to be arrested has committed or is committing any such felony; and

"(C) to make seizures of property subject to forfeiture under the internal revenue laws."

Rules of Court

Rule 16(c) of the Federal Rules of Criminal Procedure, dealing with the scope of pre-trial discovery by the Government, provides as follows:

"(c) *Discovery by the Government.* If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case,

or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

Rule 41(e) of the Federal Rules of Criminal Procedure, dealing with motions to suppress evidence, provides in pertinent part as follows:

"(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which property was seized for the return of the property and to suppress for use as evidence anything so obtained * * *."

Regulations

Organization of the Internal Revenue Service, 30 Fed. Reg. 9368, 9399-9400, published July 28, 1965 [reprinted unofficially in 9 MERTENS LAW OF FEDERAL INCOME TAXATION §49.76 (1965)] provides as follows:

"1118.6 *Intelligence Division.* The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering, and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases."

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No. 1087

In the Supreme Court of the United States

OCTOBER TERM, 1967

GRAZIANO J. MANCUSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1037

GRAZIANO J. MANCUSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged in a five-count indictment in the United States District Court for the District of Maryland with wilful attempted evasion of his income tax for the years 1956 through 1960, in violation of Section 7201 of the Internal Revenue Code of 1954 (Pet. 2). The government's evidence, based upon the net-worth method of proof, showed that petitioner had reported income for these years in amounts ranging from $591—in 1959—to some $6,000—in 1960, whereas his actual income in this period had ranged from a low of $4,709 in 1959 to a high of over $27,000 in 1957. The total understatement over the 5 years was

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$52,018.27 (A.A. 232.)[1] A jury found petitioner guilty on all counts, and he was sentenced to serve 183 days imprisonment. The court of appeals affirmed, sitting *en banc*. There is no conflict of decisions or any other matter calling for further review.

1. During the investigation a special agent of the Internal Revenue Service interviewed petitioner in June and December of 1961 (A.A. 46, 60). Before commencing the first interview, which was held in the office of the Internal Revenue Service, the agent advised petitioner of his constitutional right to say nothing and that anything he did say could be used against him in any proceeding, criminal or otherwise (A.A. 53). However, on neither occasion was petitioner advised of his right to counsel. (A.A. 52–53.)[2]

There is no merit to the argument (Pet. 8–16) that the use at trial of information given during these interviews was improper under *Escobedo* v. *Illinois*, 378 U.S. 478, and other cases, which have rested on *Miranda* v. *Arizona*, 384 U.S. 436. *Miranda* applies only to cases tried after the date of that decision, June 13, 1966. *Johnson* v. *New Jersey*, 384 U.S. 719.

[1] The designation "A.A." refers to the Appellant's Appendix in the court below.

[2] The court below was under the misapprehension that petitioner was accompanied by counsel when first interviewed. Actually it was his brother who was so represented (A.A. 48–49), petitioner being accompanied by a certified public accountant (A.A. 52). The result reached below should not, however, depend upon the assumption that petitioner was represented by counsel. Both petitioner and the United States made clear the correct facts in the papers filed pursuant to the court of appeals' *en banc* rehearing of the decision of the panel whose opinion contains the misstatement.

The case at bar was tried prior to that date. Moreover, as the court below held (Pet. 36), *Escobedo* and *Miranda* do not "suggest a duty to warn one who, like the defendant, is *not* under arrest and whose freedom of action is not curtailed." (Emphasis in original.) Petitioner was not in custody or deprived of his freedom in any way, and therefore was not subject to the kind of compulsion that the rules of *Miranda* were designed to prevent. The courts of appeals in six other circuits agree that the *Miranda* warning is not required in such a case. *Schlinsky* v. *United States*, 379 F. 2d 735 (C.A. 1), certiorari denied, 389 U.S. 920; *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[3] *United States* v. *Maius*, 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, 389 U.S. 905; *United States* v. *Mansfield*, 381 F. 2d 961 (C.A. 7), certiorari denied, December 18, 1967, No. 723, this Term; *Frohmann* v. *United States*, decided July 27, 1967, 20 A.F.T.R. 2d 5244 (C.A. 8), certiorari denied, December 4, 1967, No. 644, this Term; *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[4]

[3] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States*, 377 F. 2d 535 (C.A. 5).

[4] *United States* v. *Schoenburg*, 19 A.F.T.R. 2d 348 (D. Ariz.), and *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill.), on which petitioner relies (Pet. 10, 11, 13, 14–15), have been discredited by appellate decisions in their circuits. The weight of district court opinion agrees with the views expressed in the courts of appeals. See *United States* v. *Gleason*, 265 F. Supp. 880 (S.D.N.Y.); *United States* v. *Fiore*, 258 F. Supp. 435, 440

2. There is no merit in the argument (Pet. 8–13) that the agents violated petitioner's constitutional rights by failing to advise him that he was the subject of a criminal investigation. No such warning is necessary in the circumstances presented here. *United States* v. *Sclafani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Turner* v. *United States*, 222 F. 2d 926, 931 (C.A. 4), certiorari denied, 350 U.S. 831; *United States* v. *Frank*, 245 F. 2d 284, 285–286 (C.A. 3), certiorari denied, 355 U.S. 819; *Montgomery* v. *United States*, 203 F. 2d 887, 892–893 (C.A. 5); *Hanson* v. *United States*, 186 F. 2d 61, 64–65 (C.A. 8); cf. *Lewis* v. *United States*, 385 U.S. 206, 209–211; *Hoffa* v. *United States*, 385 U.S. 293, 300–303.

3. Petitioner's argument (Pet. 16–24) that he is entitled to a dismissal of the indictment arises from what occurred when the Assistant United States Attorney charged with the duty of trying the case, while preparing for trial, interviewed Duke, the account-

(W.D. Pa.); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Cal.); *United States* v. *Carlson*, 260 F. Supp. 423 (E.D.N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966, 19 A.F.T.R. 2d 641; *Stern* v. *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman*, 267 F. Supp. 593 (W.D. Pa.); *United States* v. *Neves*, 269 F. Supp. 158 (S.D.N.Y.); *United States* v. *Basil*, 268 F. Supp. 1018 (S.D. Fla.); *Bohrod* v. *United States*, (W.D. Wis.), decided December 14, 1965, 67–2 USTC, par. 9622. *United States* v. *Gower*, 271 F. Supp. 655 (M.D. Pa. 1967), is to the contrary, but the Third Circuit has not yet had occasion to consider the question.

Petitioner is mistaken in the assertion (Pet. 15–16) that the issues presented in this case are the same or similar to those pending in *Mathis* v. *United States*, 376 F. 2d 595 (C.A. 5), certiorari granted, 389 U.S. 896.

ant who prepared petitioner's tax returns (A.A. 113). Osborn requested Duke to bring his papers relating to petitioner. Among the papers Duke brought in were net-worth statements and other financial statements (A.A. 189–216) that he had prepared for defense counsel (A.A. 123, 220). Duke voluntarily gave Osborn the file containing the papers. Although Osborn read and copied the documents, he immediately advised defense counsel of the circumstances (A.A. 220–221).[5] Upon motion of the defense, the court ruled that the documents were privileged because they had been made for counsel in preparation for trial (A.A. 222) and suppressed them (A.A. 189–216) together with "any evidence that might have been revealed by those papers" (A.A. 11). The court further directed the return of the papers to petitioner. It rejected, however, the defense contention that dismissal of the indictment was the proper remedy (Pet. 47–48). At trial no objection was made on the ground that some part of the government's case was the fruit of Osborn's examination of Duke's file.

The only question before the court of appeals and here is whether the indictment should have dismissed and further prosecution forbidden. The court below, on rehearing *en banc*, while saying that the government "expressly disclaimed wrongful intent in what

[5] Osborn was under the impression that these net-worth statements had already been presented by the defense to an attorney in the Department of Justice in Washington (A.A. 220–221). Although the defense denied this (A.A. 222), the government's appendix in the court below (pp. 29–30) contains an affidavit by the Department attorney that he had seen them during a conference with defense counsel.

it did, and candidly admitted an extreme, even stupid, error of judgment," the court concluded unanimously that "[n]evertheless, we are persuaded that in this case wrongful intent was absent. Except for such absence and the lack of substantial prejudice, we would dismiss the prosecution and discharge the defendant under our supervisory power over the district courts of this circuit." (Pet. 38.)[6] This disposition was proper, for the conduct of the prosecutor should not operate to clothe petitioner with immunity. Notably, the cases on which petitioner relies (Pet. 18, 21, 22, 23) granted a new trial[7] rather than dismissal of the prosecution. The rationale of these cases is summed up in *United States* v. *Blue,* 384 U.S. 251, 255:

> Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the

[6] Petitioner errs in the statement (Pet. 8) that Osborn argued the case on rehearing and "'persuaded' the Court that 'wrongful intent was absent.'" Osborn argued only the point raised below and not reasserted here that the government had not made proper use of the net-worth method in computing the unreported income. The points involved in the petition for a writ of certiorari were argued by Assistant United States Attorney Goetz.

[7] Because the prosecutor's error resulted in an order to suppress before trial, a second trial, which has not been sought, would not provide petitioner any additional relief.

ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

Thus the courts below handled this unfortunate incident in a manner consonant with petitioner's rights and the public interest.

Respectfully submitted.

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FEBRUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968